

NO 964

FILED

APR 27 1943

CHARLES ELIOT CHAPLEY
CLERK

**United States Circuit Court of Appeals
FOR THE SECOND CIRCUIT.**

In the Matter of the Application
of

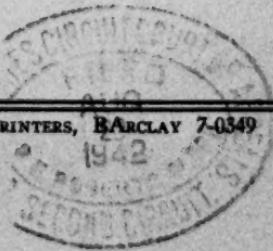
L. METCALFE WALLING, Administrator of the Wage
and Hour Division, United States Department of Labor,
for an order requiring the production of documentary
evidence by STANDARD DREDGING CORPORA-
TION, a corporation, pursuant to subpoena.

STANDARD DREDGING CORPORATION,
Appellant.

TRANSCRIPT OF RECORD

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

SUPREME PRINTING COMPANY, LAW PRINTERS, BARCLAY 7-0349





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United States District Court

1

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of the Application
of

L. METCALFE WALLING, Administrator of
the Wage and Hour Division, United
States Department of Labor, for an
order requiring the production of docu-
mentary evidence by STANDARD DREDG-
ING CORPORATION, a corporation, pur-
suant to subpoena.

2

Statement.

1942

Feb. 4—Filed order to show cause dated February 3,
1942 and petition to compel production of docu-
ments, etc.

Feb. 27—Order to show cause argued before Rifkind, J.
and answer of respondent submitted.

Apr. 27—Opinion of Rifkind, J. granting petitioner to 3
compel production of documents, etc.

May 8—Stipulation substituting L. Metcalfe Walling, as
petitioner in place of Thomas H. Holland.

May 9—Order granting petition and directing Standard
Dredging Corporation to produce documents,
etc.

May 29—Filed notice and allowance of appeal.

June 8—Stipulation waiving issuance and service of
citation on appeal.

Order to Show Cause.

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Upon the petition of Thomas W. Holland, Administrator of the Wage and Hour Division, United States Department of Labor, duly verified the 31st day of January, 1942, and filed herein on the 4th day of February, 1942, and the exhibits annexed thereto, it is hereby

ORDERED that respondent, Standard Dredging Corporation, show cause before one of the Judges of this Court, at a stated term thereof for motions, to be held in *Room 506* of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the *17th* day of February, 1942, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, *why an order of this Court should not issue requiring*

6 *said respondent to appear before Thomas W. Holland, Administrator of the Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division designated by him, at such time and place as this Court may determine, and there to produce the following books, papers, documents and records:*

1. Any and all books and records which record the wages paid to respondent's employees, during the period from October 24, 1938 to December 1, 1941.
2. Any and all books, records, documents, time cards, time sheets, papers or memoranda made or kept by

Order to Show Cause.

respondent, which record the hours worked each workday and each workweek by respondent's employees during the period from October 24, 1938 to December 1, 1941.

3. Any and all contracts, agreements or memoranda of agreements to which respondent is a party for the performance by respondent of dredging and drill work, levee construction, filling work and excavating work during the period between October 24, 1938 and December 1, 1941.

FURTHER ORDERED that service of a copy of this Order to Show Cause, together with copy of said petition of Thomas W. Holland, be made upon respondent on or before the 5th day of February, 12 noon, and that such service be deemed sufficient service.

Dated: New York, N. Y., February 3, 1942.

HULBERT,
United States District Judge.

10

Petition.

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To the United States District Court for the Southern District of New York:

11 Petitioner, Thomas W. Holland, Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Section 201 *et seq.*, hereinafter called the Act, respectfully shows and alleges that:

I. Petitioner Thomas W. Holland (herein referred to as the Administrator) is the Administrator of the Wage and Hour Division, United States Department of Labor. The Administrator, or his designated representatives are empowered by virtue of Section 11(a) of the Act to investigate, enter and inspect places and records (and make such transcriptions thereof) of employment, in any industry, as he may deem necessary or proper to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act. By virtue of Section 9 of the Act, the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 26, 1914, as amended, U. S C., Title 15, Sections 49 and 50 (relating to the attendance of witnesses and the production of books, papers and documents) are made applicable to the jurisdiction, powers and duties of the Administrator, and the

Administrator, or his authorized representative, has the power to issue and cause to be served upon any person a subpoena requiring the production of books, documents, records and papers relating to any matter under investigation;

II. Jurisdiction to issue the order hereinafter prayed for is conferred upon this Court by virtue of Section 9 of the Federal Trade Commission Act (made applicable by Section 9 of the Act, as aforesaid) which empowers any of the District Courts of the United States within the jurisdiction of which an investigation is carried on, in case of refusal to obey a subpoena to any corporation or other person, to issue an order requiring such corporation or other person to produce the books, documents, records and papers designated in the subpoena. The investigation, in the course of which the subpoena *duces tecum* was issued by the authorized representative of the Administrator and served, as hereinafter set forth, is being conducted in the Southern District of New York within the jurisdiction of this Court;

14

III. At all times hereinafter referred to, respondent was and is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at 80 Broad Street, Borough of Manhattan, City, County and State of New York, within the jurisdiction of this Court;

15

IV. Upon information and belief: C. B. Birch, during all times herein mentioned was and is an officer of respondent, to wit: its treasurer.

V. Upon information and belief: Respondent is engaged in the performance of contracts for the dredging of coastal harbors, ship channels and ship canals, navi-

gable rivers, streams and waterways in and about the navigable waters of the United States. It is also engaged in fulfilling contracts for the construction of levees, embankments, bulkheads and breakwaters, the filling and excavating of land and similar work in and about the navigable waters of the United States. In these and other ways, respondent is an employer of employees engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

17 VI. Upon information and belief: During the months of January, May and November, 1941, petitioner, acting through his representatives, sought to make an investigation of respondent's business pursuant to Section 11(a) of the Act. Such investigation was refused by respondent on the ground that its business was not subject to the provisions of the Act and that its employees were not engaged in activities covered by the Act or were subject to an exemption from the minimum wage and maximum hour provisions of the Act provided in Section 13(a)(3) for "any employee employed as a seaman". As appears from the affidavit of Henry J. Easton annexed hereto as

18 Exhibit "A", respondent refused to permit a representative of the Wage and Hour Division to examine records pertaining to hours worked by or compensation received by such employees. Continuous efforts have been made by representatives of the Wage and Hour Division to persuade respondent to permit such an investigation, but without success.

VII. Thereafter Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Department of Labor, whom your petitioner succeeded in office, under the powers delegated to him in the Act, issued an Order for Investigation of respondent and designated

therein his representatives for the purpose of such investigation. A copy of said Order for Investigation is annexed hereto, marked Exhibit "B" and made a part hereof.

VIII. Thereafter a subpoena *duces tecum* was duly issued by the said Philip B. Fleming, as Administrator of the Wage and Hour Division, requiring respondent to appear before one of the officers of the Wage and Hour Division designated in said Order for Investigation at 341 Ninth Avenue, Borough of Manhattan, City of New York, in Room 911 on the ninth floor, on the 23rd day of December, 1941 at 10:30 o'clock in the forenoon of that date and to produce specific books, papers, documents and records. Said subpoena *duces tecum* was duly served upon respondent by delivering a duplicate original copy thereof to C. B. Birch, treasurer of respondent, at its place of business in New York, New York, on December 18, 1941. A copy of said subpoena *duces tecum* with the return endorsed thereon is annexed hereto, marked Exhibit "C" and made a part hereof.

IX. Upon information and belief: At all times herein stated the said C. B. Birch, as an officer of respondent corporation, had and has custody and control of the books, papers, documents and records described in the said subpoena *duces tecum*.

X. At 10:30 A. M. on the 23rd day of December, 1941, Henry J. Easton, an officer of the Wage and Hour Division designated in said Order for Investigation and in said subpoena *duces tecum* was present at the office of the Wage and Hour Division, 341 Ninth Avenue, Borough of Manhattan, City of New York, in Room 911 on the ninth floor, for the purpose of examining the books,

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21

papers, documents and records, production of which was required by the said subpoena, but respondent failed and refused to appear at the said time and place before the said officer or to produce the said books, papers, documents and records, as is more fully set forth in the affidavit of said Henry J. Easton annexed hereto, marked Exhibit "A" and made a part hereof.

XI. On December 23, 1941, Arthur E. Reyman, Regional Attorney of the Wage and Hour Division of the U. S. 23 Department of Labor for Region II, received a letter from Messrs. Kirlin, Campbell, Hickox, Keating & McGrann, attorneys, on behalf of respondent, stating that their client is not subject to the Act, because it is not engaged in commerce or in the production of goods for commerce within the meaning of the Act, and that, assuming but without admitting that respondent is engaged in activities covered by the Act, nevertheless respondent's employees are seamen exempt under the provisions of Section 13(a)(3) of the Act. The said letter further states that, in accordance with advice of counsel, respondent does not intend to comply with the subpoena issued herein until this question is determined by Federal courts. 24 A copy of said letter is annexed hereto, marked Exhibit "D" and made a part hereof.

XII. All of the books, records, papers, documents, contracts, agreements, memoranda required to be produced by said subpoena were at the time of the issuance of said subpoena and are now relevant, material and appropriate to determine whether respondent has violated any provision of the Act and will aid in the enforcement of the provisions of the Act.

XIII. The books, records, papers, documents, contracts, agreements and memoranda required to be produced by

said subpoena were at the time of the issuance and service of said subpoena and are now in the possession, custody and control of respondent.

XIV. Petitioner respectfully appeals to this Court for an Order directing respondent to appear before him or before one or more of said authorized representatives and to produce the books, records, papers, documents, contracts, agreements and memoranda required by said subpoena as set forth above, at a time and place to be fixed in said Order.

XV. This application is brought on by Order to Show Cause rather than by Notice of Motion for the reason that the investigation hereinabove referred to has been seriously impeded by respondent's refusal to comply with said subpoena and because it is desirable that said investigation proceed as expeditiously as possible in order that violations of the Act, if found to exist, may be dealt with according to law without undue delay.

XVI. No previous application has been made for the relief requested herein.

WHEREFORE petitioner respectfully prays:

(a) That an Order be issued forthwith directing respondent to appear and show cause before this Court upon a certain day to be fixed in the said Order, why an Order should not issue requiring said respondent to produce the books, records, papers, documents, contracts, agreements and memoranda required by said subpoena *duces tecum*, before the petitioner or before one of his authorized representatives, at such time and place as this Court may order.

(b) That upon the return of said Order to Show Cause, as above set forth, an Order issue requiring respondent to produce the books, records, papers, documents, con-

tracts, agreements and memoranda required by said subpoena *duces tecum*, before petitioner or before one of his authorized representatives at such time and place as this Court may order.

(e) That petitioner have such other and further relief as may be necessary or appropriate.

WARNER W. GARDNER,
Solicitor,

IRVING J. LEVY,
Associate Solicitor in Charge
of Litigation,

ARTHUR E. REYMAN,
Regional Attorney,

JAMES L. GOLDWATER,
Attorney,

Attorneys for Petitioner,
United States Department of Labor.

Post Office Address:

% Wage and Hour Division,
U. S. Department of Labor,
341 Ninth Avenue,
New York, N. Y.

or

% Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

EXHIBIT "A."

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter of the Application
of

THOMAS W. HOLLAND, Administrator of
the Wage and Hour Division, United
States Department of Labor, for an
order requiring the production of docu-
mentary evidence by STANDARD DREDG-
ING CORPORATION, a corporation, pur-
suant to subpoena.

32

State of New York, }
County of New York, }ss.:

33

HENRY J. EASTON, being duly sworn, deposes and says:

He is an inspector in the Wage and Hour Division of the United States Department of Labor and is officially attached to the Regional Office for Region II of the Wage and Hour Division located at 341 Ninth Avenue, New York, New York.

During the month of January, 1941 deponent was designated to make an investigation of respondent's business pursuant to Section 11(a) of the Act. On or about January 16, 1941 and on or about May 6, 1941 deponent called at respondent's place of business and spoke to one C. B.

Birch who, deponent was informed, is treasurer of respondent. Again on or about November 24, 1941 deponent called the said C. B. Birch on the telephone at respondent's office, 80 Broad Street, Borough of Manhattan, City of New York, and spoke with the same C. B. Birch. On each of said occasions deponent demanded of the said C. B. Birch that he be permitted to inspect the books, records and other documents relating to the hours worked by and wages paid to respondent's employees. On each occasion deponent was informed by said C. B. Birch that,

35 while respondent would permit deponent to examine the payroll of those of respondent's employees, approximately four in number, who performed office work, deponent would not be shown records relating to any other employees, and said C. B. Birch in behalf of respondent in fact refused to permit deponent to examine records pertaining to the hours worked by or compensation received by such other employees.

On December 5, 1941 a subpoena *duces tecum* was duly issued by Philip B. Fleming, Administrator of the Wage and Hour Division, and duly served upon respondent, requiring respondent to appear before one of the officers of the Wage and Hour Division mentioned in said subpoena *duces tecum* at 341 Ninth Avenue, Borough of Manhattan, City of New York, in Room 911 on the ninth floor, on the 23rd day of December 1941 at 10:30 o'clock in the forenoon and to produce certain books, papers, records and documents in the matters under investigation.

36

Deponent was present at the place designated in said subpoena *duces tecum* at 10:30 o'clock in the forenoon on December 23, 1941 and for several hours thereafter and awaited the appearance of respondent or its representative but said respondent and its representative and its attorneys failed and refused to appear in answer to said subpoena and did fail and refuse to produce any of the

aforesaid books, papers, documents and records described in the aforesaid subpoena.

HENRY J. EASTON.

Sworn to before me this
31st day of Jan., 1942.

MORRIS GLICK,
Notary Public, New York County,
Clerk's No. 405, Register's No. 3-G-589,
Commission Expires March 30, 1943.

38

(Seal)

EXHIBIT "B."

UNITED STATES OF AMERICA
WAGE AND HOUR DIVISION
DEPARTMENT OF LABOR

REGION No. II

39

In the Matter
of
STANDARD DREDGING CORPORATION.

ORDER FOR INVESTIGATION AND DESIGNATING OFFICERS
FOR TAKING TESTIMONY.

There being reasonable grounds to believe that the STANDARD DREDGING CORPORATION, beginning on or about October 24, 1938, and continuing to the date hereof, has violated the provisions of Sections 7 and 15(a)(2) of the

Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, *et seq.*), hereinafter referred to as the Act, in that, during the said period, it has employed many of its employees, engaged in commerce or in the production of goods for commerce, for workweeks longer than the hours specified by Section 7 of the Act and has failed to compensate them for their employment in excess of the said hours at rates not less than one and one-half times the regular rates at which they were respectively employed; and

41 There being reasonable grounds to believe that the said STANDARD DREDGING CORPORATION, during the said period, has violated the provisions of Sections 11(c) and 15(a)(5) of the Act in that it has failed to make, keep and preserve records of the persons employed by it and of the wages, hours and other conditions and practices of employment maintained by it as prescribed by regulations issued by the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to Section 11(c) of the Act, which regulations, together with amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516; and

It appearing, therefore, that the investigation herein ordered to be made is necessary and appropriate to determine whether the said STANDARD DREDGING CORPORATION, or any of its officers, agents or employees has violated the said provisions of the Act or the provisions of the said regulations, and will aid in the enforcement of the provisions of the Act;

The undersigned, PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, hereby

ORDERS, pursuant to Sections 9 and 11(a) of the Act, that an investigation be made to determine whether

STANDARD DREDGING CORPORATION or any of its officers, agents or employees has violated any of the said provisions of the Act or of the said regulations; and further

ORDERS, pursuant to Sections 9 and 11(a) of the Act, that for the purpose of such investigation Roy J. CORRIGAN and HENRY J. EASTON, officers of the Wage and Hour Division, United States Department of Labor, and each of them, be and they hereby are designated to investigate and gather such data, enter and inspect such places and such records (and make such transcriptions thereof), 44 question such employees, and investigate such facts, conditions, practices, or matters as they, or any of them, may deem relevant or material to the inquiry, and to administer oaths and affirmations, take evidence and require the production of any pay roll or other records pertaining to the wages, hours and other conditions and practices of employment of the said STANDARD DREDGING CORPORATION, and of any books, papers, correspondence, memoranda or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith authorized by law; and further

45

ORDERS that such investigation begin and continue at such times and places as the said Administrator or the said officers, or any of them, may determine.

IN WITNESS WHEREOF, I have hereunto set my hand at Washington, D. C. this 5 day of Dec., 1941.

PHILIP B. FLEMING (sgd.)
PHILIP B. FLEMING, Administrator
Wage and Hour Division,
U. S. Department of Labor

EXHIBIT "C".

UNITED STATES OF AMERICA
Department of Labor
Wage and Hour Division
SUBPOENA DUCES TECUMTO STANDARD DREDGING CORPORATION
80 Broad Street, New York, New York

47

At the instance of the ADMINISTRATOR, WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR, you are hereby required to appear before ROY J. CORRIGAN and HENRY J. EASTON, officers of the WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR, at Room 911, Parcel Post Building, 341 Ninth Avenue, in the Borough of Manhattan, in the City, County and State of New York, on the 23rd day of December, 1941, at 10:30 o'clock a. m. of that day, to testify In the Matter of STANDARD DREDGING CORPORATION, involving a cause of action pursuant to the provisions of Sections 9 and 11(a) of the Fair Labor Standards Act of 1938 of

48 complaints of violations by the said Standard Dredging Corporation of Sections 7, 11(c), 15(a)(2) and 15(a)(5) of the said Act.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

(1) Any and all books and records which record the wages paid to your employees during the period from October 24, 1938, to December 1, 1941.

(2) Any and all books, records, documents, time cards, time sheets, papers or memoranda of any kind made by

you, which record the hours worked each workday and each workweek by the said employees during the period from October 24, 1938, to December 1, 1941.

(3) Any and all contracts, agreements or memoranda of agreement to which Standard Dredging Corporation is a party for the performance by Standard Dredging Corporation between October 24, 1938, and December 1, 1941, of dredging and drill work, levee construction, filling work and excavating work.

FAIL NOT AT YOUR PERIL.

IN TESTIMONY WHEREOF, the seal of the DEPARTMENT OF LABOR is affixed hereto, and the undersigned, an officer designated by the ADMINISTRATOR of the WAGE AND HOUR DIVISION of said DEPARTMENT OF LABOR, has hereunto set his hand at Washington, D. C. this 5th day of December, 1941.

PHILIP B. FLEMING (Signed)

PHILIP B. FLEMING, Administrator

Wage and Hour Division,

United States Department of Labor

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher

Petition.

EXHIBIT "D".

Ira A. Campbell
 Charles R. Hickox
 Cletus Keating
 Wm. H. McGrann
 Robert S. Erskine
 L. de Grove Potter
 Delbert M. Tibbets
 Vernon S. Jones
 Donald D. Geary
 Roger Siddall
 H. Maurice Fridlund
 Edwin S. Murphy
 James H. Herbert
 Clement C. Rinehart
 Raymond Parmar
 A. V. Cherbonnier
 Joseph F. Luley
 Richard Sullivan

53

Cablegrams "Vasefield New York"
 KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRAN
 One Twenty Broadway

New York, December 22, 1947

U. S. Department of Labor
 Wage and Hour Division
 341 Ninth Avenue
 New York, New York *Attention of Mr. Reyma*

Standard Dredging Company

Dear Sirs:

54

As attorneys for Standard Dredging Company upon whom you served a subpoena *duces tecum*, we wish to advise you that in our opinion the Standard Dredging Company is not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938. In addition, assuming but without admitting that the Company is so engaged, we are of the opinion that its employees are seamen and, therefore, are exempt under the provisions of Section 13(a)(3) of the Act.

As you know, the Company operates dredges, towboats and other maritime equipment and the courts have for many years past held that such employees are seamen within the meaning of various other Federal statutes. We see no reason why these men should be seamen within the meaning of one Federal statute and not seamen within the meaning of another Federal statute.

For the above reasons, we wish to advise you that the Company does not intend to comply with the subpoena

until this question is determined by Federal courts. The decision on the part of the Company is not arbitrary but in the honest belief that the men aboard its maritime equipment are not subject to the provisions of the Act.

We confirm our understanding that you will serve us with a notice if you intend to seek to enforce the subpoena in the Federal District Court and that the motion will be brought on some time during the week of January 12th, 1942.

Very truly yours,

KIRLIN, CAMPBELL, HICKOX, KEATING & McGRANN,
By /s/ A. V. CHERBONNIER.

56

AVC/te
39012

cc to Standard Dredging Company
(Mr. Birch)

State of New York, {
County of New York, }^{ss.}

JAMES L. GOLDWATER, being first duly sworn, deposes and says that he is an Associate Attorney of the Wage and Hour Division; that he has read the foregoing Petition for an Order of this Court and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

57

/s/ JAMES L. GOLDWATER.

Sworn to and subscribed before me this
31st day of Jan., 1942.

MORRIS GLICK,
Notary Public, New York County,
Clerk's No. 405, Register's No. 3-G-589,
Commission Expires March 30, 1943.

(Seal)

Answer to Petition.

UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

TO THE HONORABLE THE JUDGES OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK:

59

Standard Dredging Corporation, respondent above named, by its attorneys, Kirlin, Campbell, Hickox, Keating & McGrann, in answer to the petition filed herein, alleges upon information and belief as follows:

60

1. It admits that the petitioner, Thomas W. Holland, is Administrator of the Wage and Hour Division, United States Department of Labor. It denies that Section 11 (a) of the Fair Labor Standards Act of 1938 (hereinafter called "Act") empowers the petitioner to investigate and gather data regarding the wages, hours and other conditions and practices of employment, or take any other step whatever in any industry except such industries as are subject to the provisions of the said Act. It denies each and every other allegation contained in Paragraph I of the petition except as herein expressly admitted.

2. It admits the jurisdiction of this Court to order compliance to a subpoena properly issued by the petitioner but it denies that petitioner is entitled to the relief sought in the petition.

3. It admits the matters alleged in Paragraphs III and IV of the petition.

4. It denies each and every matter alleged in Paragraph V of the petition except as herein expressly admitted. Respondent is engaged in the business of dredging to improve waterways and fill low lying land and it is authorized to do business only in the States of New York, Louisiana and Texas.

5. It admits that it informed representatives of petitioner that it was not engaged in "commerce" as that term is defined in the Act, or as the Act is intended to comprehend the term. It also admits that it informed representatives of petitioner that assuming, but not admitting, that the Act otherwise covered its employees, its employees are "seamen" employed aboard dredges, tow-boats, launches and various types of barges and scows and under the provisions of Section 13 (a) (3) of the Act, "seamen" are specifically excluded from the provisions of Sections 6 and 7 of the Act. It denies that it has knowledge or information sufficient to form a belief as to the other matters alleged in Paragraph VI of the petition.

6. It denies that it has knowledge or information sufficient to form a belief as to the matters alleged in Paragraph VII of the petition.

7. It admits that a copy of Exhibit C attached to the petition was given to C. R. Birch, its Treasurer. It denies the other matters alleged in Paragraph VIII of the petition.

8. It admits that the books, papers, documents and records described in said subpoena *duces tecum* are in the custody and control of respondent corporation and that said C. R. Birch, as Treasurer of respondent corporation, has such control over the same as a treasurer of a corporation customarily has. It denies each and every other allegation in Paragraph IX of the petition.

9. It admits that respondent did not appear or produce the books, papers, documents and records described in the subpoena *duces tecum* before said Henry J. Easton or any other officer of the Wage and Hour Division on December 23, 1941, at the office of the Wage and Hour Division. It denies that it has knowledge or information sufficient to form a belief as to the other allegations in Paragraph X of the petition.

65 10. It admits that its counsel addressed a letter to the Wage and Hour Division, in New York, in accordance with Exhibit D attached to the petition.

11. It denies each and every matter alleged in Paragraph XII of the petition.

12. It admits the matters alleged in Paragraph XIII of the petition.

13. It denies petitioner's right to the order prayed for in Paragraph XIV of the petition.

66 14. It denies that petitioner is entitled to make the investigation referred to in Paragraph XV of the petition. It denies that a disclosure by respondent of the documents referred to in the subpoena would aid in the determination of whether or not those employed aboard respondent's dredges, towboats, launches, barges and scows are "seamen". It denies that it has knowledge or information sufficient to form a belief as to the other matters alleged in Paragraph XV of the petition.

15. It denies that it has knowledge or information sufficient to form a belief as to the matters alleged in Paragraph XVI of the petition.

FURTHER ANSWERING, AND AS A SEPARATE DEFENSE, IT
ALLEGES:

All dredges operated by respondent are documented vessels of the United States and all supporting equipment are vessels, as that word is applied to maritime affairs. The employees on vessels come within the provisions of U. S. Revised Statutes, Paragraph 4612 (46 U. S. C. A. Paragraph 713) and are "seamen" within the purview of Section 13 (a) (3) of the Act and as the Act comprehends the word "seamen."

All equipment operated by respondent is within the admiralty and maritime jurisdiction of the United States and although respondent's business has a direct reference to commerce, respondent is not engaged in commerce or in the production of goods for commerce. Respondent produces no goods of any sort, nor does petitioner allege that respondent is engaged in the production of goods for commerce.

Respondent is not engaged in "commerce" as that word is defined in the Act and as the Act was intended to comprehend it; it is not engaged in any commercial intercourse among the several states or from any state to any place outside thereof. Respondent's business is confined to certain localities and consists solely of digging "ditches" in such localities or pumping and moving dirt in specified localities. Equipment operated by respondent moves on navigable waters of the United States in order to get to the various localities where the ditches are dug or the pumping is done. Respondent does not now own, nor has it ever owned, any of the equipment which it operates or has ever operated in its dredging business. Respondent is not engaged in the business of transportation.

Respondent denies that Congress, when it passed the Act, exercised its power to legislate on matters within

the admiralty and maritime jurisdiction of the United States but, on the contrary, Congress limited the exercise of its power to "regulate commerce among the several states." Congress did not exercise its full power under the commerce clause of the Constitution as the Act does not purport to regulate commerce "with the Indian tribes" or to regulate commerce from "foreign Nations" to the United States.

71 The minimum wages paid to employees engaged in dredging operations of a public nature are fixed in all contracts promulgated by the United States Government and in all cases such minimum wages are greatly in excess of the minimums provided for in Section 6 of the Act. Petitioner does not allege that respondent has paid its employees less than the minimums provided for in the Act. Regardless of whether or not respondent is engaged in commerce or the production of goods for commerce and regardless of whether or not its employees are "seamen" within the provisions of Section 13 (a) (3) of the Act, petitioner is not entitled to inspect respondent's records concerning the amount of wages paid its employees unless and until it is decided that respondent's employees and respondent are subject to the provisions of the Act and there has been a violation of Section 7 of the Act.

72 Petitioner seeks to inspect "any and all contracts, agreements or memorandum of agreements to which Standard Dredging Corporation is a party for the performance by Standard Dredging Corporation between October 24, 1938, and December 1, 1941, of dredging and drill work, levy construction, filling work and excavating work". There are 29 such contracts, 18 of which are with departments of the United States Government and the contracts are in the possession of the United States Government and petitioner, as a representative thereof, has or should have access to such contracts; 3 of the contracts are with municipalities and consist of filling in low lying

land; 8 of the contracts are with private persons and consist of work on navigable waters in and around private property.

WHEREFORE, respondent prays that the petition herein be dismissed and that respondent be granted such other and further relief as justice in the premises may require.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
Attorneys for Respondent,
120 Broadway,
New York, New York. 74

State of New York, {
County of New York, {ss.:

C. R. BIRCH, being duly sworn, says:

I am the Treasurer of Standard Dredging Corporation, the respondent herein.

I have read the foregoing answer and know the contents thereof and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds for my belief as to the matters not within my own knowledge are obtained from records of respondent and statements of counsel.

The reason this verification is not made by respondent is that it is a corporation.

/s/ C. R. BIRCH. 75

Sworn to before me this
24th day of February, 1942.

HENRIETTA FORTENBACHER,
Notary Public.

(Seal)

Opinion, Rifkind, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

PRESENT:

77 WARNER W. GARDNER, Esq.,
 Attorney for Petitioner.

IRVING J. LEVY, Esq.,
ARTHUR E. REYMAN, Esq.,
JAMES L. GOLDWATER, Esq.,
MORTIMER C. WOLF, Esq.,
of Counsel.

MESSRS. KIRLIN, CAMPBELL, HICKOX,
KEATING & MCGRANN,
Attorneys for Respondent.

78 A. V. CHERBONNIER, Esq.,
 of Counsel.

Argued: February 27, 1942.

RIFKIND, D. J.

This is an application for an order to enforce a subpoena *duces tecum* issued by the Administrator of the Wage and Hour Division of the United States Department of Labor. The relief is sought under the Fair Labor Standards Act of 1938.

The respondent interposes two objections to the enforcement of the subpoena. The first is that all but four of respondent's employees are seamen and as such are exempt under the law. But Section 13(a) of the Act does not grant a general exemption concerning seamen. It provides: "The provisions of sections 6 and 7 shall not apply with respect to * * * (3) any employee employed as a seaman". Section 6 establishes minimum wages; section 7 establishes maximum hours. These two sections are not the whole of the Act. Section 12, for instance, deals with child labor; section 14 with apprentices.

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There is nothing in section 13(a) to express a congressional intention to make these and other provisions of the Act inapplicable to seamen. It may be that they are inapplicable—and no opinion is expressed thereon—but, if so, it is for reasons other than the exemptions provided by section 13(a).

The second objection interposed by respondent is that it is not engaged in commerce as defined in the Act. The question presented is whether that makes any difference. If this were a proceeding to enforce section 6 or 7(a) of the Act the test would be whether the *employees* affected were engaged in commerce or in production of goods for commerce. Under section 7(c) the question is whether the *employer* is engaged in the activities therein enumerated. Under section 5, the nature of the "industry" is the relevant guide. The duty imposed by section 11(c) is expressly confined to employers "subject to any provision of this Act". Manifestly, Congress has in each of the instances mentioned specifically delimited the incidence of the particular provision involved. The Administrator's power to issue a subpoena is derived from sections 9 and 11(a). Is the character of respondent's activity relevant to those sections? Section 9 does not answer the

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question. The first sentence of section 11(a) reads as follows:

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"The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

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The term "industry" which is employed in the foregoing section is defined in section 3(h). " 'Industry' means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed." The definition of industry evidently does not include the term "employer", which is separately defined in section 3(d). Industry, as defined in the Act, is the concept utilized in the organization of industry-committees under section 5; it is wider and more inclusive than the term employer.

With these preliminaries it seems clear that section 11(a) confers upon the Administrator two distinct groups of powers. (1) He may investigate any industry *subject to the Act*; (2) he may investigate *any matters* which he deems necessary or appropriate to determine whether any person has violated the Act or which may aid in the enforcement of the Act. In other words, I do not construe the phrase "subject to this Act" as a limitation on the power to investigate which is contained in the latter half of the sentence.

A logical line divides the two powers of investigation. The first power is apparently intended largely for statistical and informational purposes. Its object is knowledge, like that of much of the data gathered under the census, not law enforcement. It is, therefore, addressed to an "industry" and not to an "employer". The second power is designed to facilitate the enforcement of a law which necessarily requires on part of the government an intimate acquaintance with working conditions, wages and hours of employment in individual establishments. The power granted is as broad as the need. "To determine whether any person has violated any provision of this Act" it is no more requisite to know what wages he pays and what hours he keeps than to know whether he is engaged in commerce. There is nothing in section 11(a) to indicate a legislative intent that the Administrator may investigate concerning the former but that he must guess at the latter. Nor is there evident in the statute a purpose to divide an investigation into two distinct stages, one to ascertain the presence of "commerce" and the other, to determine other elements of violation of the law.

Since there is no limitation on the character of business done by the person investigated, it follows that the Administrator is not obliged, as a condition of obtaining an enforcement order of his subpoena, to make any showing that the respondent is engaged in commerce.

Contra: General Tobacco & Grocery Co. v. Fleming, C. C. A. 6, 1942, 125 Fed. 2d 596.

In so providing, Congress has not exceeded its powers.

U. S. v. Darby, 1940, 312 U. S. 100, 125.

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Opinion, Rifkind, D. J.

No reported authority passing on the precise question here presented which supports the view taken herein has been called to my attention.⁽¹⁾ Upon the argument counsel for the Administrator stated that the precise question was considered in *Cudahy Packing Co. of La., Ltd. v. Fleming*. However, neither the opinion of the Circuit Court of Appeals, C. C. A. 5th 1941, 119 Fed. 2d 209, nor the opinion of the U. S. Supreme Court, reported *sub nom. Cudahy Packing Co. of La., Ltd. v. Holland*, decided March 2, 1942, makes any reference thereto.

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The application is granted.
Submit order.

Dated April 27th, 1942.

/s/ SIMON H. RIFKIND,
U. S. D. J.

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(1) In the following cases "commerce" was present. The effect of its absence was not discussed. *Fleming v. Montgomery Ward & Co., Inc.*, C. C. A. 7, 1940, 114 Fed. 2d 384, 391, cert. den. 61 S. Ct. 71, "Since respondent is subject to the Act, the investigation is a lawful inquiry." *Fleming v. Cudahy Packing Co., Ltd.*, S. D. Cal. 1941, 41 Fed. Supp. 910, 912: The respondent stipulated in open court that it was engaged in interstate commerce.

Stipulation Dated May 6, 1942.

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UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED by and between the above-entitled parties, by their respective attorneys, that L. METCALFE WALLING is now the duly qualified Administrator of the Wage and Hour Division, United States Department of Labor, succeeding THOMAS W. HOLLAND, the above-named petitioner, that said L. METCALFE WALLING may be substituted herein as the petitioner in the place and stead of the said THOMAS W. HOLLAND, and that this cause may be continued and maintained by said L. METCALFE WALLING as successor in office of the said THOMAS W. HOLLAND.

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Dated: New York, N. Y., this 6th day of May, 1942.

WARNER W. GARDNER,
Solicitor,

ROY C. FRANK,
Assistant Solicitor,

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ARTHUR E. REYMAN,
Regional Attorney,

WILLIAM E. SULLIVAN,
Assistant Attorney,

United States Department of Labor,
Attorneys for Petitioner.

KIRLIN, CAMPBELL, HICKOX, KEATING & McGRANN,
Attorneys for Respondent.

So ordered.

May 6, 1942.

HENRY W. GODDARD,
U. S. D. J.

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Order Dated May 9, 1942.

UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

95 THOMAS W. HOLLAND, Administrator of the Wage and Hour Division, United States Department of Labor, having moved by order to show cause dated February 3, 1942, for an order of this Court directing respondent, Standard Dredging Corporation, a New York corporation, to appear before petitioner, or an officer or officers of the Wage and Hour Division duly designated by him, at such time and place as this Court may order, and there to produce the following books, papers and documents:

96 1. Any and all books and records which record the wages paid to its employees during the period from October 24, 1938, to December 1, 1941.

2. Any and all books, records, documents, time cards, time sheets, papers or memoranda of any kind made by it, which record the hours worked each workday and each workweek by said employees during the period from October 24, 1938, to December 1, 1941.

3. Any and all contracts, agreements or memoranda of agreement to which Standard Dredging Corporation is a party for the performance by Standard Dredging Corporation between October 24, 1938, and December 1, 1941, of dredging and drill work, levee construction, filling work and excavating work;

Order Dated May 9, 1942.

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and to give evidence such as is required by the Subpoena *duces tecum* of the Administrator of the Wage and Hour Division, which was duly served upon respondent in connection with an investigation of respondent pursuant to Sections 9 and 11(a) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Congress; 52 Stat. 1060); and

Said motion having duly come on to be heard before Honorable Simon H. Rifkind, United States District Judge, on February 27, 1942, and upon consideration of the application of the petitioner, the answer of the respondent thereto, and after hearing argument of counsel on behalf of the parties, and on all of the proceedings herein,

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Now, THEREFORE, on motion of the attorneys for the Administrator of the Wage and Hour Division, and sufficient cause appearing therefor, it is

ORDERED, that respondent Standard Dredging Corporation, do appear before petitioner, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor who as successor in office of the said Thomas W. Holland has been duly substituted as petitioner herein, or any other officer or officers duly designated by petitioner, on May 18, 1942, at 10:00 o'clock a. m., at Room 911, Parcel Post Building, 341 Ninth Avenue, in the Borough of Manhattan, City, County and State of New York, and there produce the books and records detailed in paragraphs 1, 2 and 3 of the said order to show cause.

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Dated: New York, New York, May 9, 1942.

SIMON H. RIFKIND,
United States District Judge.

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Notice and Allowance of Appeal.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SIRS:

101 PLEASE TAKE NOTICE that Standard Dredging Corporation, the respondent herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order directing said Standard Dredging Corporation to appear before the petitioner and produce certain documents, entered herein on May 9, 1942, and that the respondent hereby petitions this Court that said appeal be allowed.

Dated, New York, May 28, 1942.

Yours, etc.,

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
Attorneys for Respondent,
Office and Post Office Address:

102

120 Broadway,
Borough of Manhattan,
City of New York.

To:

WARNER W. GARDNER, Esq., Solicitor,
ROY C. FRANK, Esq., Assistant Solicitor,
ARTHUR E. REYMAN, Esq., Regional Attorney,
WILLIAM E. SULLIVAN, Esq., Assistant Attorney,
U. S. Department of Labor,

Attorneys for Petitioner,

Post Office Address:

Arthur E. Reyman,

Regional Attorney,

United States Department of Labor,

341 Ninth Avenue,

New York, N. Y.

ALLOWANCE.

The appeal contained in the foregoing notice and petition be and is hereby allowed.

Dated, New York, May 28, 1942.

SAMUEL MANDELBAUM,
U. S. D. J.

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, *June 24*, 1942.

KIRLIN, CAMPBELL, HICKOX, KEATING & McGRANN,
Attorneys for Respondent.

WARNER W. GARDNER,
Solicitor,

ROY C. FRANK,
Assistant Solicitor,

ARTHUR E. REYMAN,
Regional Attorney,

WILLIAM E. SULLIVAN,
Assistant Attorney,

Attorneys for Petitioner.

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Clerk's Certificate.

UNITED STATES OF AMERICA, }
Southern District of New York, }
ss.:

[SAME TITLE]

I, GEORGE J. H. FOLLMER, Clerk of the District Court
of the United States of America for the Southern District
of New York, do hereby Certify that the foregoing is a
107 correct transcript of the record of the said District Court
in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the
said Court to be hereunto affixed, at the City of New
York, in the Southern District of New York, this 25th.
day of June, in the year of our Lord one thousand
nine hundred and forty-two and of the Independence of
the said United States the one hundred and sixty-sixth..

GEORGE J. H. FOLLMER,
Clerk.

(Seal)

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[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1942

No. 63

(Argued November 4, 1942. Decided January 14, 1943)

L. METCALFE WALLING, Administrator, etc., Appellee,

v.

STANDARD DREDGING CORPORATION, Appellant

Appeal from an order of the United States District Court for the Southern District of New York requiring an employer to appear before the Administrator of the Wage and Hour Division, and produce certain books and records.

Before L. Hand, Clark and Frank, Circuit Judges

Arthur E. Reyman, for the Appellee.

Robert A. Lilly, for the Appellant.

PER CURIAM:

Order affirmed on authority of *Perkins v. Endicott-Johnson*, 317 U. S. —.

[fol. 38] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of January one thousand nine hundred and forty-three.

Present: Hon. Learned Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

In the Matter of Application of L. METCALFE WALLING, Administrator of Wage and Hour Division, etc., Standard Dredging Corp., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 39] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re L. Metcalfe Walling, Administrator, etc. (Standard Dredging Corp.). Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 30, 1943. D. E. Roberts, Clerk.

[fol. 40] Clerk's Certificate to foregoing transcript omitted in printing.

(4945)

